

1 PAUL B. SNYDER  
2 United States Bankruptcy Judge  
1717 Pacific Ave, Suite 2209  
3 Tacoma, WA 98402

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5 **September 11, 2008**

6 MARK L. HATCHER  
CLERK U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA  
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DEPUTY

8 **UNITED STATES BANKRUPTCY COURT**  
9 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

10 In re:

11 YOSHIKO SAITO HAINES,

12 Debtor.

13 YOSHIKO SAITO HAINES,

14 Plaintiff,

15 v.

16 INTERNAL REVENUE SERVICE,

17 Defendant.

Case No. 08-41390

Adversary No. 08-04066

18 **MEMORANDUM DECISION**

19 **NOT FOR PUBLICATION**

20 This matter came before the Court on September 4, 2008, on the United States'  
21 Second Motion to Dismiss filed on behalf of the Internal Revenue Service (IRS). In her  
22 Amended Complaint, Yoshiko Saito Haines (Plaintiff) seeks to have returned to her the  
23 \$39,545.80 levied by the IRS for assessed taxes, punitive damages, release of the tax lien,  
24 and other relief. The parties agreed to waive oral argument. This Memorandum Decision  
25 shall constitute Findings of Fact and Conclusions of Law as required by Fed. R. Bankr.  
P. 7052.

MEMORANDUM DECISION - 1

## **FINDINGS OF FACT**

The Debtor failed to file income tax returns and pay taxes due for the 1998 through 2007 tax years. As a result of this failure, an Internal Revenue Service Agent prepared substitute returns for the Plaintiff, assessed the Plaintiff, and proceeded to attempt to collect on the delinquent taxes owed. On September 15, 2005, the IRS filed a tax lien against the Plaintiff in the Pierce County Auditor's Office. On June 22, 2007, the IRS instituted a monthly levy upon the Pension Benefit Guaranty Corporation (PBGC) because the Plaintiff was awarded an interest in her ex-husband's fixed benefit pension plan. Pursuant to the levy, the IRS received seven payments of \$5,656.40 totaling \$39,594.80. The IRS received its last levy payment on March 31, 2008. The Plaintiff filed a voluntary Chapter 11 bankruptcy on this date at 4:05 p.m.

The IRS filed a proof of claim for \$1,940,538.58 for pre-petition income taxes alleged to be owed. On June 13, 2008, the Plaintiff initiated this adversary proceeding by filing a complaint (Complaint) against the IRS and PBGC. After the United States of America (United States), on behalf of the IRS, had filed a Motion to Dismiss, the Plaintiff filed an Amended Complaint, dismissing PBCG and asserting additional relief against the IRS. On September 4, 2008, the Plaintiff filed a pleading entitled "Addendum to Amended Complaint" (Addendum). The Plaintiff never sought leave of the Court to amend her Complaint, contrary to Fed. R. Civ. P. 15(a) made applicable by Fed. R. Bankr. P. 7015. Nonetheless, the Court now grants the Plaintiff authority to amend her original Complaint, nunc pro tunc, and has considered the Plaintiff's September 4, 2008 Addendum. After the Plaintiff filed the Amended Complaint, the United States withdrew its Motion to Dismiss. On August 12, 2008, the Court entered an

1 Order dismissing PBGC.

2 On August 15, 2008, the United States, on behalf of the IRS, filed a Second Motion to  
3 Dismiss. The United States moves to dismiss the Plaintiff's Amended Complaint pursuant to  
4 Fed. R. Civ. P. 12(b)(1) and (6), made applicable by Fed. R. Bankr. P. 7012(b).

5                   **II**

6                   **CONCLUSIONS OF LAW**

7 A party may move to dismiss a case under Fed. R. Civ. P. 12(b)(1) for lack of subject  
8 matter jurisdiction. A federal court is presumed to lack subject matter jurisdiction until a  
9 plaintiff establishes otherwise; thus, the plaintiff bears the burden of establishing the existence  
10 of subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375,  
11 377, 114 S. Ct. 1673 (1994).

13 In order for a court to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6), it must  
14 be established that the plaintiff has failed "to state a claim upon which relief can be granted."  
15 While a complaint does not need detailed factual allegations, it requires "more than labels and  
16 conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell  
17 Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). "[A]ll well-pleaded allegations of  
18 material fact are taken as true and construed in a light most favorable to the non-moving  
19 party." Wyler Summit P'ship v. Turner Broad. Sys., Inc. 135 F.3d 658, 661 (9th Cir. 1998).  
20 While factual allegations in the complaint are assumed to be true, they "must be enough to  
21 raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965. A plaintiff's  
22 conclusory unsupported allegations may be disregarded. Holden v. Hagopian, 978 F.2d  
23 1115, 1121 (9th Cir. 1992).

1           **A. Improper Defendant**

2           The United States correctly states that the IRS is not an entity subject to suit and  
3 should be dismissed. Krouse v. U.S. Gov't Treasury Dep't IRS, 380 F. Supp. 219, 221 (D.C.  
4 Cal. 1974). In its Second Motion to Dismiss, the United States consents to substitution of it as  
5 the proper defendant in lieu of the IRS. Additionally, in the Plaintiff's Addendum, the Plaintiff  
6 names the United States as a defendant. Consequently, in order to resolve the issues  
7 presented and save the Court and litigants resources, the Court shall dismiss the IRS,  
8 substitute the United States for the IRS, and rule on the balance of the United States' motion.

9  
10          **B. Subject Matter Jurisdiction**

11           1.       Refund Action

12           The Plaintiff's Amended Complaint appears to seek a refund of \$39,545.80 received in  
13 a levy. While a bankruptcy estate may seek a tax refund under 11 U.S.C. § 505(a)(2)(B), the  
14 United States argues that the Plaintiff has failed to meet a jurisdictional pre-requisite for  
15 maintaining a refund action in any court, let alone this Court.

16           The law regarding claims for tax refunds is unusually clear, and does not appear  
17 to admit any exceptions: "No suit or proceeding shall be maintained *in any court*  
18 for the recovery of any internal revenue tax . . . until a claim for refund or credit  
19 has been duly filed with the Secretary . . ." 26 U.S.C. § 7422(a) (emphasis  
20 added).

21           In re Graham, 981 F.2d 1135, 1138 (10th Cir. 1992). The administrative claim must be filed  
22 within the later of two years after the tax was paid or three years after the return was filed. 26  
23 U.S.C. § 6511(a). "These rules are nonwaivable jurisdictional requirements." Graham, 981  
24 F.2d at 1138. "Simply put, no claim, no refund." Graham, 981 F.2d at 1138. The United  
25 States' declaration in support of the Second Motion to Dismiss states in paragraph five that  
the Plaintiff has not pursued or exhausted administrative claims for a refund of income taxes.

1 The Plaintiff has not alleged that she has filed a claim for refund with the Secretary. Unless  
2 and until an administrative claim is filed, the Plaintiff has not satisfied the jurisdictional  
3 requirements for a refund action.

4       2.     Collection Due Process (CDP) Hearing

5           The Plaintiff's Amended Complaint appears to seek equitable relief from, or review, of  
6 the IRS's collection of assessed taxes via a tax lien filed in Pierce County and a levy upon  
7 PBGC. The United States argues that a CDP Hearing was held and determination was made  
8 concerning the collection actions, but that the Plaintiff chose not to dispute the determination.  
9 The United States' declaration provides that the IRS Appeals Officer who conducted that CDP  
10 Hearing sent the Plaintiff a Notice of Determination by certified mail on January 12, 2006, but  
11 the Plaintiff did not petition either the Tax Court or District Court to review the settlement  
12 officer's determination within thirty days as required by 26 U.S.C. § 6330(d)(1). Because  
13 review of the CDP hearing can occur only in the District Court or Tax Court, the United States  
14 argues that this Court lacks subject matter jurisdiction to review the collection claim. This  
15 Court agrees that it lacks subject matter jurisdiction to review the validity of the levy upon  
16 PBGC or provide any equitable relief there from.

17       3.     Fraud Claim

18           The Plaintiff appears to allege fraud by the IRS in "stealing funds" from the Plaintiff.  
19 The United States correctly asserts that to the extent the Plaintiff has alleged a claim for fraud,  
20 the Federal Tort Claims Act, 28 U.S.C. § 2671, does not extend to "[a]ny claim arising in  
21 respect to the assessment or collection of any tax . . ." 28 U.S.C. § 2680(c).

22           For the reasons stated above, this Court lacks subject matter jurisdiction over the  
23 Plaintiff's action against the United States, and the United States is entitled to dismissal

1 pursuant to Fed. R. Civ. P. 12(b)(1). As set forth below, dismissal is also warranted pursuant  
2 to Fed. R. Civ. P. 12(b)(6).

3 **C. No Claims Upon Which Relief Can be Granted**

4       1. Taxpayer

5           The primary contention underlying the Plaintiff's action is that she is not a taxpayer,  
6 and thus not subject to the Internal Revenue Code (IRC). IRC §§ 1 and 6012(a)(1)(A) require  
7 United States citizens whose income exceeds certain thresholds to file income tax returns.  
8 IRC § 6151(a) requires taxpayers to submit payments with their tax returns. Exhibit 1 to the  
9 United States' declaration indicates a taxable income of \$1,024,418 for the Plaintiff for the tax  
10 period ending December, 1998. The Plaintiff has failed in her burden of proof in establishing  
11 that she is not a taxpayer. Since the core allegation in the Plaintiff's Amended Complaint is  
12 that she is not a taxpayer, she has failed to state a claim upon which relief can be granted,  
13 and the United States is entitled to dismissal of the Amended Complaint pursuant to Fed. R.  
14 Civ. P. 12(b)(6).

16       2. Substitute Returns

17           The Plaintiff also contends that the IRS prepared substitute returns, which are the basis  
18 of the tax assessments, without authority and that these substitute returns are not valid  
19 support for the tax assessments. IRC § 6020, however, authorizes the IRS to prepare a  
20 return if a person fails to do so. 26 U.S.C. § 6020(a), (b)(1). Moreover, any return "so made  
21 and subscribed by the Secretary shall be *prima facie* good and sufficient for all legal  
22 purposes." 26 U.S.C. § 6020(b)(2). The Plaintiff has failed to state a claim upon which relief  
23 can be granted.

The United States is entitled to dismissal of all claims against it made by the Plaintiff in her Amended Complaint filed August 6, 2008, and referenced in the Plaintiff's Addendum.

DATED: September 11, 2008

*Paul B. Snyder*

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Paul B. Snyder  
U.S. Bankruptcy Judge

**MEMORANDUM DECISION - 7**